HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

CONSTITUTIONALITY OF INSURANCE RATE REGULATION. — Almost all statutory regulation of insurance imposes a sufficient restriction on a pre-existing liberty of contract to present a *primâ facie* case within the inhibition of the "due process" clauses of the federal and state constitutions,[1] and calls for justification as an exercise of some of those legislative powers which are available in spite of those constitutional prohibitions. The larger part of American legislation on insurance has operated to protect the public against fraudulent and insolvent underwriters and to assure policy holders of the performance of the promises made to them. As an appropriate means of effecting this result it has been held proper to restrict the business to corporations;[2] to require a specified capital;[3] to forbid discrimination and rebating;[4] and to compel the issuance of valued fire policies.[5] That the attainment of this object is a legitimate exercise of the police power in the narrower sense, the promotion of the health, morals, safety, and welfare of the public, is well settled.[6] The prevention of monopoly is another well-settled branch of the police power and has been upheld in its application to insurance.[7]

[1] Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. 427.

[2] Commonwealth *v.* Vrooman, 164 Pa. St. 306, 30 Atl. 217.

[3] People *v.* Loew, 19 N. Y. Misc. 248, 44 N. Y. Supp. 42.

[4] This is to remedy cut-throat competition. Equitable Life Assurance Society of the United States *v.* Commonwealth, 113 Ky. 126, 67 S. W. 388.

[5] By this method a careful estimation of the risk is assured. See Insurance Co. *v.* Leslie, 47 Oh. St. 409, 416, 24 N. E. 1072, 1074.

[6] The Supreme Court of the United States has recently reasserted this in approving the Oklahoma Guaranty Fund Act. Noble State Bank *v.* Haskell, 219 U. S. 104, 31 Sup. Ct. 186.

[7] Carroll *v.* Greenwich Ins. Co. of New York, 199 U. S. 401, 26 Sup. Ct. 66.

A recent federal case decided that an act providing for a general regulation of fire insurance rates,[8] was a proper exercise of the police power. *German Alliance Ins. Co.* v. *Barnes*, 189 Fed. 769 (Circ. Ct., D. Kan.). But it is submitted that this power, indefinite as it is, may not be used to justify a general regulation of rates, unless it affords a suitable remedy for some recognized public evil. A previous course of legislation such as has been outlined above will not, in itself, justify a further restriction, as an exercise of the police power.[9] If the only purpose of the enactment is to suppress a practice on the part of insurance companies of overreaching their customers in the matter of prices, this act is not a legitimate exercise of the police power, and any general language in the principal case which is susceptible of a contrary construction [10] can scarcely be deemed declaratory of the law. If we except the usury laws, whose compatibility with our Constitution must be explained on historical grounds,[11] the preponderance of judicial opinion has opposed the extension of the police power to interference with private contracts merely to protect citizens from a hard bargain.[12] If, however, it were necessary to support the statute as an exercise of the police power, it might be supported on a ground not taken by the court, but well recognized, the protection of property.[13] The increase of the moral hazard by unduly low, or high, premiums and its attendant danger to the underwriter affords good reason for a statute to secure safe and reasonable rates.[14] But, like many other statutes regulating insurance, the Kansas act may be sustained as an exercise of the undoubted right of a state to regulate corporations of its own creation [15] and to prescribe the conditions upon which foreign corporations may do business within its borders.[16]

It is intimated in the principal case [17] that the business of insurance is affected with a public use and therefore subject to a general regulation. But the business of insurance does not constitute either a legal or virtual

[8] KAN. SESS. LAWS, 1909, c. 152. The general provisions of the statute are that fire insurance companies shall file their rates and abide by them. If the rates are found unreasonable, the superintendent of insurance may refuse a certificate allowing them to do business until a reasonable schedule is filed.

[9] Wynehamer *v.* People, 13 N. Y. 378.

[10] For such general language, see p. 777 of the principal case.

[11] See FREUND, POLICE POWER, § 304; TIEDEMAN, POLICE POWER, § 94.

[12] Adair *v.* United States, 208 U. S. 161, 28 Sup. Ct. 277; Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539; State *v.* Missouri Tie & Timber Co., 181 Mo. 536, 80 S. W. 933; Harding *v.* People, 160 Ill. 459, 43 N. E. 624. *Contra*, Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. 1; Scheuermann *v.* Union Central Life Ins. Co., 165 Mo. 641, 65 S. W. 723. The United States case is based on three cases not involving the same issue. The Missouri case, unless explicable on some other ground, seems opposed in principle to the later case of State *v.* Missouri Tie & Timber Co., *supra*. For a discussion of the authorities see an article by Professor Pound in 18 YALE L. J. 454, 482 *et seq.*

[13] Thorpe *v.* Rutland & Burlington R. Co., 27 Vt. 140.

[14] See GRISWOLD, FIRE UNDERWRITERS' TEXT BOOK, §§ 1485–1488.

[15] McGannon *v.* Michigan Millers' Mutual Fire-Ins. Co., 127 Mich. 636, 87 N. W. 61; Iowa Life Ins. Co. *v.* Eastern Mutual Life Ins. Co., 64 N. J. L. 340, 45 Atl. 762.

[16] Paul *v.* Virginia, 8 Wall. (U. S.) 168; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 Sup. Ct. 281; Head Camp Woodmen of the World *v.* Sloss, 49 Colo. 177, 112 Pac. 49.

[17] For *dicta* to the same effect, see People *v.* Loew, *supra*; North American Ins. Co. *v.* Yates, 214 Ill. 272, 276, 73 N. E. 423, 425; State *ex rel.* *v.* Ackerman, 51 Oh. St. 163, 194, 37 N. E. 828, 835.

monopoly.[18] Competition is still keen, and legally it is a matter of common right.[19] Moreover, the nature of the business is repugnant to such a theory, for a necessary incident of a public calling is the duty to give equal service to all.[20] And if the law should impose such an obligation on underwriters, they would be deprived of that *delectus personarum*, which is a necessary incident to a safe conduct of the business.[21]

VALIDITY OF FOREIGN MARRIAGES. — "A marriage good where made is good everywhere." [1] But England and America seemed to define marriage differently. England maintains that it must be a "voluntary union for life of one man and one woman to the exclusion of all others." [2] So long as the union has these qualities, it matters not under what system of law the marriage contract was created. The monogamous marriage of a British subject in Japan, that complies with the Japanese law, is valid in England,[3] though non-Christian. The "rice" marriage of two Tamils in Ceylon is recognized, since it also involves these characteristics." [4] On the other hand, the restitution of conjugal rights after a Mormon marriage has been refused,[5] although in the very case the defendant had no other wife; so also with a polygamous Parsee marriage.[6] Again, the marriage of a white man to an African Baralong has been declared not a marriage in any sense that can be recognized, for by the custom of the tribe their marriages are terminable at will.[7]

The American courts, on the other hand, have recognized such marriages. Several early cases have held American Indian tribal marriages valid, and have recognized that this status is terminable at will.[8] This does not, however, show whether the American courts regard these marriages as inherently peculiar, or as in fact unions for life, and the right to terminate them at will as only a convenient form of divorce, sanctioned by tribal custom. But a recent case has gone so far as to say that this tribal custom operates to divorce a marriage, contracted outside the tribe. A white man, who had been adopted by the Pottawatomie Indians, married the plaintiff, a white woman, in Illinois. Later he abandoned her and returned to live among the Indians. The plaintiff is refused dower in his lands. *Cyr* v. *Walker*, 116 Pac. 931 (Okl.). This case can

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[18] See FREUND, POLICE POWER, § 377; WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 29–36.

[19] Allgeyer *v.* Louisiana, *supra*.

[20] Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822.

[21] See GRISWOLD, FIRE UNDERWRITERS' TEXT BOOK, § 1488.

[1] See STORY, CONFLICT OF LAWS, § 113.

[2] See Bethell *v.* Hildyard, 38 Ch. D. 220, 234.

[3] Brinkley *v.* Attorney General, 15 P. D. 76.

[4] Sastry Velaider Aronegary *v.* Sembecutty, 6 App. Cas. 364.

[5] Hyde *v.* Hyde & Woodmanese, L. R. 1 P. & D. 130.

[6] Ardasee Cursetjee *v.* Perozeboye, 10 Moore P. C. 375.

[7] Bethell *v.* Hildyard, *supra*.

[8] Wall *v.* Williamson, 8 Ala. 48; Johnson *v.* Johnson, 30 Mo. 72; La Riviere *v.* La Riviere, 77 Mo. 512; Kobogum *v.* Jackson Iron Co., 76 Mich. 498, 43 N. W. 602; Earle *v.* Godley, 42 Minn. 361, 44 N. W. 254. So also in Canada. Connolly *v.* Woolrich, 11 L. C. Jur. 197. *Contra*, Roche, *v.* Washington, 19 Ind. 53.